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Attorney for:
STARR INDEMNITY & LIABILITY COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

STARR INDEMNITY & LIABILITY
COMPANY, a Texas corporation,

Plaintiff,

v.

PEERLESS INSURANCE COMPANY, a
New Hampshire corporation,
GOLDEN EAGLE INSURANCE
CORPORATION, a New Hampshire
corporation, and DOES 1-10,

Defendants.

Case No.

STARR INDEMNITY & LIABILITY
COMPANY'S COMPLAINT FOR
DECLARATORY RELIEF, EQUITABLE
SUBROGATION, AND EQUITABLE
INDEMNITY

Plaintiff Starr Indemnity & Liability Company
("Starr"), by and through its undersigned attorney, alleges
as follows:

JURISDICTION AND VENUE

1. Jurisdiction. This is a civil action between
citizens of different states and the amount in controversy
exceeds \$75,000, exclusive of costs and interest. This
court has diversity jurisdiction under 28 U.S.C. § 1332.
Additionally, this court has jurisdiction for providing

1 declaratory relief under 28 U.S.C. § 2201.

2 2. Plaintiff Starr is a corporation organized and
3 existing under the laws of the State of Texas with its
4 principal place of business in New York, New York.

5 3. Defendant Peerless Insurance Company ("Peerless")
6 is a corporation organized and existing under the laws of
7 the State of New Hampshire with its principal place of
8 business in Boston, Massachusetts.

9 4. Defendant Golden Eagle Insurance Corporation
10 ("Golden Eagle") is a corporation organized and existing
11 under the laws of the State of New Hampshire with its
12 principal place of business in Boston, Massachusetts.

13 5. Venue. A substantial part of the events allegedly
14 giving rise to this dispute took place in San Luis Obispo
15 County, California, making venue proper in the Western
16 Division.

17 **FACTUAL ALLEGATIONS**

18 **A. The Subject Incident**

19 6. This action arises from Defendants' failure to
20 acknowledge that coverage under its business auto insurance
21 policy, pursuant to a Department of Motor Vehicles
22 Endorsement ("DMV Endorsement"), applies and is primary to
23 Starr's excess insurance policy for a mutual insured in an
24 underlying action. Starr issued a true excess policy such
25 that Starr owes no sums until liability limits under all
26 underlying insurance, including Defendants' business auto
27 policy, pursuant to the DMV Endorsement, and a third party
28 commercial general liability policy, are exhausted.

1 7. Starr is informed and believes and thereupon
2 alleges that Severo Mares, Jr. ("Mares"), and Refugio
3 Ramirez, Jr. ("Ramirez"), were traveling westbound on
4 Highway 46 in San Luis Obispo County, California, in their
5 employer's 2005 Chevrolet Silverado Utility truck for work
6 on September 20, 2013.

7 8. Starr is informed and believes and thereupon
8 alleges that Mares and Ramirez collided with the 1973
9 Caterpillar 651V Scraper (the "Scraper") of Papich
10 Construction Company, Inc. ("Papich") on September 20,
11 2013.

12 9. Starr is informed and believes and thereupon
13 alleges that the September 20, 2013 incident occurred when
14 the Scraper was used in the course and scope of Papich's
15 business for which a motor carrier permit is required.

16 10. A suit arising out of the September 20, 2013
17 incident was filed in the California Superior Court, San
18 Luis Obispo County, Case No. CV138294, and is styled *Mares*
19 *v. Bogunda* (the "Underlying Action"). The Underlying
20 Action is ongoing.

21 11. Starr is informed and believes and thereupon
22 alleges that Papich tendered the Underlying Action to
23 Papich's insurers: National Union Fire Insurance Company
24 of Pittsburgh, PA, the commercial general liability
25 insurer; Defendants, the business auto insurer; and Starr,
26 the excess insurer.

27 ///

28 ///

1 **B. The Policies**

2 **1. National Union's Commercial General Liability**
3 **Policy**

4 12. Starr is informed and believes and thereupon
5 alleges that third party insurer National Union Fire
6 Insurance Company of Pittsburgh, PA ("National Union")
7 issued commercial general liability policy number 3023433
8 to Papich, with a policy period from January 25, 2013, to
9 January 25, 2014 (the "CGL Policy").

10 13. Starr is informed and believes and thereupon
11 alleges that the CGL Policy provides a \$2,000,000 each
12 occurrence liability limit.

13 **2. Defendants' Business Auto Policy**

14 14. Defendants issued business auto policy number BA
15 8291564 to Papich, with a policy period from July 1, 2013,
16 to July 1, 2014 ("Defendants' Auto Policy").

17 15. Defendants' Auto Policy provides a \$1,000,000
18 liability limit.

19 16. Defendants' Auto Policy includes a DMV Endorsement
20 that states the insurer must pay, "consistent with the
21 limits it provides," any legal liability for bodily injury,
22 death or property damage arising out of "use of any
23 vehicle(s) for which a motor carrier permit is required,
24 whether or not such vehicle(s) is described in the attached
25 policy." The DMV Endorsement also states, "This insurance
26 policy covers all vehicles used in conducting the service
27 performed by the insured for which a motor carrier permit
28 is required whether or not said vehicle(s) is listed in the

insurance policy":

This Endorsement shall be attached to and made a part of all policies insuring motor carriers of property required to obtain a permit pursuant to the Motor Carriers of Property Permit Act, commencing with California Vehicle Code section 34600. The purpose of this Endorsement is to assure compliance with the Act and related rules and regulations.

Insurer agrees to each of the following:

- The coverage provided by the endorsement excludes any costs of defense or other expense that the policy provides.
- To pay, consistent with the minimum insurance coverage required by California Vehicle Code Section 34631.5, and consistent with the limits it provides herein, any legal liability of insured for bodily injury, death, or property damage arising out of the operation, maintenance, or use of any vehicle(s) for which a motor carrier permit is required, whether or not such vehicle(s) is described in the attached policy.
- No provision, stipulation, or limitation contained in the attached policy or any endorsement shall relieve insurer from obligations arising out of this Endorsement or the Act, regardless of the insured's financial solvency, indebtedness or bankruptcy.
- The Certificate of Insurance shall not be canceled on less than thirty (30) days notice from the Insurer to the DMV, written on an authorized Notice of Cancellation form and that the thirty (30) day/period commences to run from the date the Notice of Cancellation was actually received at the office of the California Department of Motor Vehicles, Motor Carrier Services Branch, in Sacramento, California.
- To furnish DMV with a duplicate original of the referenced policy, DMV authorized endorsement, and all other related endorsements and documentation upon request.
- Except as specified in this endorsement, the terms, conditions, and limitations of this policy remain in full force and effect. This endorsement shall not prevent insurer from seeking reimbursement from insured for any

1 payment made by insurer solely on account of the
2 provisions herein.

3 Insurer certifies to each of the following:

4 This insurance policy covers all vehicles used in
5 conducting the service performed by the insured
6 for which a motor carrier permit is required
7 whether or not said vehicle(s) is listed in the
8 insurance policy.

9 **3. Starr's Excess Policy**

10 17. Starr issued excess policy number SISCCCL001740913
11 to Papich, with a policy period from January 25, 2013, to
12 January 25, 2014 ("Starr's Excess Policy").

13 18. Starr's Excess Policy provides a \$10,000,000 each
14 occurrence limit, and a \$10,000,000 aggregate limit.

15 19. The Schedule of Underlying Insurance in Starr's
16 Excess Policy lists the CGL Policy and Defendants' Auto
17 Policy.

18 20. The insuring agreement in Starr's Excess Policy
19 states in part:

20 A. We will pay on behalf of the Insured, the
21 "Ultimate Net Loss" in excess of the "Underlying
22 Insurance" as shown in ITEM 5. of the
23 Declarations, that the Insured becomes legally
24 obligated to pay for loss or damage to which
25 this insurance applies and that takes place in
26 the Coverage Territory. Except for the terms,
27 definitions, conditions and exclusions of this
28 Policy, the coverage provided by this Policy
shall follow the terms, definitions, conditions
and exclusions of the applicable First
Underlying Insurance Policy(ies) shown in ITEM
5.A. of the Declarations.

B. Regardless of any other warranties, terms,
conditions, exclusions or limitations of this
Policy, if any applicable Underlying Insurance
Policy(ies) does not cover "Ultimate Net Loss"
for reasons other than exhaustion of its limit
of liability by payment of claims or suits, then
this Policy will not cover such "Ultimate Net
Loss".

21. The "other insurance" clause in Starr's Excess Policy, which establishes how loss is apportioned among insurers when more than one policy covers the same loss, states in part:

If other insurance applies to "Ultimate Net Loss" that is also covered by this Policy, this Policy will apply excess of, and will not contribute to, the other insurance. Nothing herein will be construed to make this Policy subject to the terms, conditions and limitations of such other insurance. However, other insurance does not include:

1. "Underlying Insurance";
2. Insurance that is specifically written as excess over this Policy; or
3. Insurance held by a person(s) or organization(s) qualifying as an additional insured in "Underlying Insurance", but only when the written contract or agreement between you and the additional insured requires a specific limit of insurance that is in excess of the Underlying Limits of Insurance. However, the Limits of Insurance afforded the additional insured in this paragraph shall be the lesser of the following:
 - a. The minimum limits of insurance required in the contract or agreement between you and the additional insured; or
 - b. The Limits of Insurance shown in the Declarations of this Policy.

Other insurance includes any type of self-insurance or other mechanism by which an Insured arranges for the funding of legal liabilities.

C. Defendants' Failure To Acknowledge Coverage For Papich Under The DMV Endorsement In The Underlying Action

22. Starr is informed and believes and thereupon alleges that National Union is providing Papich with a defense in the Underlying Action.

23. Starr is informed and believes and thereupon

1 alleges that National Union does not contest its CGL Policy
2 applies and is primary to Starr's Excess Policy for any
3 coverage obligations owed to Papich in the Underlying
4 Action.

5 24. Starr has followed up with Defendants continuously
6 about Defendants' coverage obligations to Papich in the
7 Underlying Action under California law, showing Defendants'
8 Auto Policy, pursuant to the DMV Endorsement, applies and
9 is primary to Starr's Excess Policy.

10 25. Starr is informed and believes and thereupon
11 alleges that, to date, Defendants have not taken a coverage
12 position in the Underlying Action, despite having coverage
13 obligations to Papich pursuant to the DMV Endorsement in
14 Defendants' Auto Policy.

15 26. Starr is informed and believes and thereupon
16 alleges that, to date, Defendants have not issued a
17 reservation of rights letter or disclaimer letter to Papich
18 regarding the Underlying Action.

19 27. Starr is informed and believes and thereupon
20 alleges that, to date, Defendants have refused to
21 participate in any settlement discussions regarding the
22 Underlying Action, including but not limited to attending
23 mediations.

24 28. Starr is informed and believes and thereupon
25 alleges that, to date, Defendants have not acknowledged
26 that Defendants' Auto Policy, pursuant to the DMV
27 Endorsement, applies and is primary to Starr's Excess
28 Policy for any coverage obligations owed to Papich in the

Underlying Action.

29. Starr is informed and believes and thereupon alleges that, to date, Defendants have not acknowledged that Starr owes no obligation to Papich in the Underlying Action until liability limits under Defendants' Auto Policy, pursuant to the DMV Endorsement, and the CGL Policy are exhausted.

FIRST CAUSE OF ACTION FOR DECLARATORY RELIEF

(Defendants' Auto Policy, Pursuant To The DMV Endorsement, Applies And Is Primary To Starr's Excess Policy In The Underlying Action)

30. Starr realleges and incorporates by this reference all preceding paragraphs above, in their entirety, as though fully set forth herein.

31. An actual controversy has arisen and now exists between Starr and Defendants concerning their respective rights and obligations under the Defendants' Auto Policy, including the DMV Endorsement, and Starr's Excess Policy, in that Starr contends, and Defendants disagree, that:

a. Defendants' Auto Policy, pursuant to the DMV Endorsement, applies and is primary to Starr's Excess Policy for any coverage obligations owed to Papich in the Underlying Action; and

b. Starr has no coverage obligation to Papich in the Underlying Action until the liability limits in Defendants' Auto Policy and the CGL Policy are exhausted.

32. As Starr has no speedy or adequate remedy at law,

1 Starr requests that this court declare and decree
2 Defendants' Auto Policy, pursuant to the DMV Endorsement,
3 applies and is primary to Starr's Excess Policy for any
4 coverage obligations owed to Papich in the Underlying
5 Action, and Starr has no coverage obligation to Papich in
6 the Underlying Action until the liability limits in
7 Defendants' Auto Policy and the CGL Policy are exhausted.

8 **SECOND CAUSE OF ACTION FOR EQUITABLE SUBROGATION**

9 33. Starr realleges and incorporates by this reference
10 all preceding paragraphs above, in their entirety, as
11 though fully set forth herein.

12 34. In contravention of applicable law, Defendants
13 have not acknowledged that Defendants' Auto Policy,
14 pursuant to the DMV Endorsement, applies and is primary to
15 Starr's Excess Policy for any coverage obligations owed to
16 Papich in the Underlying Action, and Starr has no coverage
17 obligation to Papich in the Underlying Action until the
18 liability limits in Defendants' Auto Policy and the CGL
19 Policy are exhausted.

20 35. As a result of Defendants' wrongful conduct, if
21 Starr contributes to any judgment or settlement against
22 Papich in the Underlying Action that falls within the
23 \$1,000,000 layer of insurance under Defendants' Business
24 Auto Policy, pursuant to the DMV Endorsement, Starr is
25 entitled to recover Starr's contribution from Defendants.

26 36. As a result of Defendants' wrongful conduct, if
27 Defendants fail to settle any judgment or settlement
28 against Papich in the Underlying Action within the

1 \$1,000,000 layer of insurance under Defendants' Business
2 Auto Policy, pursuant to the DMV Endorsement, Starr is
3 entitled to recover any additional sums Starr pays as a
4 result of Defendants' failure to settle.

5 37. Pursuant to principles of equitable subrogation,
6 Starr may assert in this action all claims that the insured
7 could have asserted against Defendants.

8 **THIRD CAUSE OF ACTION FOR EQUITABLE INDEMNITY**

9 38. Starr realleges and incorporates by this reference
10 all preceding paragraphs above, in their entirety, as
11 though fully set forth herein.

12 39. Defendants are responsible for providing a
13 \$1,000,000 layer of insurance under the DMV Endorsement in
14 Defendants' Auto Policy that applies and is primary to the
15 \$10,000,000 liability limit of excess insurance under
16 Starr's Excess Policy.

17 40. Defendants abdicated their duty to provide
18 indemnity for Papich in the Underlying Action by refusing
19 to acknowledge Defendants' Auto Policy, pursuant to the DMV
20 Endorsement, applies and is primary to Starr's Excess
21 Policy for any coverage obligations owed to Papich in the
22 Underlying Action, and Starr has no coverage obligation to
23 Papich in the Underlying Action until the liability limits
24 in Defendants' Auto Policy and the CGL Policy are
25 exhausted.

26 41. Therefore, equity requires that Defendants fully
27 indemnify Starr for all payments within the \$1,000,000
28 layer of insurance under the DMV Endorsement in Defendants'

1 Auto Policy that Starr will expend in any settlement or
2 judgment of the Underlying Action against Papich for which
3 Defendants are wholly responsible, in an amount which will
4 be proven at trial.

5 PRAYER FOR RELIEF

6 Wherefore, Starr prays for relief as follows:

7 1. For a declaration that Defendants' Auto Policy,
8 pursuant to the DMV Endorsement, applies and is primary to
9 Starr's Excess Policy for any coverage obligations owed to
10 Papich in the Underlying Action.

11 2. For a declaration that Starr has no coverage
12 obligation to Papich in the Underlying Action until the
13 liability limits in Defendants' Auto Policy and the CGL
14 Policy are exhausted.

15 3. Recovery of Starr's contribution to any judgment
16 or settlement against Papich in the Underlying Action that
17 falls within the \$1,000,000 layer of insurance under
18 Defendants' Business Auto Policy, pursuant to the DMV
19 Endorsement, if Defendants fail to settle any such judgment
20 or settlement within their \$1,000,000 layer.

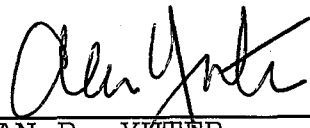
21 4. Recovery of any additional sums Starr pays as a
22 result of Defendants' failure to settle any judgment or
23 settlement against Papich in the Underlying Action within
24 the \$1,000,000 layer of insurance under Defendants'
25 Business Auto Policy, pursuant to the DMV Endorsement, if
26 Defendants fail to settle any such judgment or settlement
27 within their \$1,000,000 layer.

28 5. For costs of suit herein.

6. For such other and further relief as this Court may deem just and proper.

DATED: January 27, 2015

SELMAN BREITMAN LLP

By: 
ALAN B. YUTER
Attorney for Plaintiff
STARR INDEMNITY & LIABILITY
COMPANY

Selman Breitman LLP
ATTORNEYS AT LAW